No. 12694.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON LEON DAIGLE, and AZILE CAROL DAIGEL, Individually and as a Copartnership Doing Business as "The Lodge," and STATE OF CALIFORNIA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

EDMUND G. BROWN,
Attorney General of the State of California,
BAYARD RHONE,
Deputy Attorney General,
600 State Building, Los Angeles 12,
Attorneys for the Appellant State of California,

GEORGE, WINKLER & GIBBS,
210 Brix Building, Fresno, California,
Attorneys for Appellants Petersen, et al.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLANTS' REPLY BRIEF.

In this Reply Brief appellants will point out some of the fallacies of law and the misstatements of facts, and the statements not supported by the record, appearing in appellee's brief. Of necessity, the presentation in this brief does not follow the order of presentation in either of the preceding briefs, but the subject matter will be identified by appropriate headings.

I.

Statement of Question Involved.

Appellant disagrees with the appellee's statement of the question involved. The appellants are concerned with one specific lawsuit involving the interpretation of the particular acts of cession and also involving the funda-

mental jurisdiction of the federal courts to punish offenses. This lawsuit does not involve the question stated by appellee, thus, "May a state constitutionally cede exclusive police jurisdiction over privately owned property in a state, and may the federal government constitutionally accept such jurisdiction?"

This broad, all-inclusive question is not involved in the present litigation. The appellants believe that there was no attempt by the State of California to cede nor by the United States to accept jurisdiction on such a broad scale as is now suggested by the appellee. We are concerned specifically in this instance whether the District Court may enjoin, or punish for, the sale of liquor on premises located within Wilsonia Village pursuant to a license issued only by the State Board of Equalization. This Court is not asked to determine all questions involving jurisdiction of innumerable islands of privately owned property located within the exterior boundaries of the many national parks in the western states. We are concerned with one specific instance, and in that instance our concern is with the particular wording of the particular acts. This action is no different than any other action relating to the use of, or title to, real property—the particular instruments relating to the particular property must be studied and interpreted. When these particular instruments are examined it will be seen that the property in question was never "dedicated and set apart for park purposes."

The appellee's principal argument in his brief is what he calls "the evolution of the problem" and the propound-

ing and answering of four questions. These questions briefly are, Does the State of California purport to cede exclusive jurisdiction over private property within Kings Canyon National Park; if so what is the constitutional authority for such cession; does the United States purport to accept exclusive jurisdiction over such property; and if so what is the constitutional authority for such acceptance of jurisdiction. It is the position of the appellants that the broad questions on the Constitution are not involved in this proceeding in any way. By such a device the appellee seeks to divert the attention of the Court from an examination of the particular ceding instruments to a high policy plain. So far as the State of California is concerned we are not concerned in this proceeding in any way whatsoever with any problem as to whether the State of California has constitutional authority to make a cession of exclusive jurisdiction over private property in the State of California nor the federal government has constitutional authority to accept such jurisdiction. Any discussion upon these points is purely academic and is not germane to the matter before the Court. These questions were propounded by the trial court, and have been adopted by the appellee in its brief in this Court. The assumption of the trial court and the appellee seems to be that if there is constitutional authority on the one hand of the state to cede and on the other hand for the United States to accept that, *ipso facto,* the State of California has ceded and the United States has accepted jurisdiction over privately owned lands in Wilsonia Village. This case does not involve any such issues. This case involves only an examination of the explicit language of the particular ceding acts and the fundamental law of Congress relating to the criminal jurisdiction of district courts.

II.

Statements of Alleged Fact in Appellee's Brief Not Supported by the Record.

This case was submitted for decision in the District Court upon a written stipulation of facts. The stipulation provided that the matters therein stated except certain paragraphs could be admitted without objection as evidence [Tr. pp. 24-26]; but that the stipulation did not prevent any party from introducing any other admissible facts. [Tr. p. 42.] No additional evidence was offered; but an objection was made, and sustained, as to paragraphs XX and XXIX. [Tr. p. 42.] There are numerous alleged statements of fact in the brief of appellee which are not supported any way by the record. The appellants hesitate to emphasize these improper and in many cases untrue facts. Many of these same matters appeared in the brief of appellee in the District Court, and the Court's attention was called then to the impropriety.

At the outset the appellee states that there are approximately 100 tracts of such privately owned land, not counting subdivisions, in the national parks situated in California, and that these tracts represent less than one percent of the total area of the California national parks. (Appellee's Brief p. 3.) In the stipulation of facts [Tr. p. 33, paragraph IX] it was agreed that there are large numbers of small parcels of privately owned lands scattered throughout Kings Canyon National Park and other national parks in California, and that these tracts are set forth on a map which was attached as Exhibit "C." How-

ever, there is nothing whatever in the record to warrant a conclusion of such a broad statement in appellee's brief. Not only do we question the propriety of such a statement, we question the accuracy thereof.

The appellee next says (p. 4) that even today some lands are being patented in these national parks. There is no foundation whatever for this statement. The appellee also states (p. 4) that there are also state owned school lands and certain other lands owned by states or political subdivisions in some of our western national parks. This statement has no foundation of any kind in the record.

The appellee states (p. 5) that the legal question is whether the State of California or the United States has jurisdiction over these small islands of privately owned, state owned, county owned, and municipally owned lands which are in national parks. This obviously is not the case. We are concerned specifically with the sale of liquor pursuant to a license issued by the Board of Equalization for premises located within Wilsonia Village. Admittedly the decision of this Court might affect other properties.

The appellee (p. 6) states that Tulare County has no police officers or sheriff's deputies within Kings Canyon National Park and that the nearest Tulare County peace officer is located about 35 miles distant, and that the National Park Service Rangers are stationed on park land within a few hundred yards of the boundaries of Wilsonia Tract. This statement is taken from paragraph XX of the stipulation. But an objection was sustained at the trial to this particular paragraph and it therefore cannot be considered for any purpose.

The fact is, and it was so stipulated, that a permit to sell liquor was requested by the appellants Petersen *et al.,* from the National Park Service and such an application was denied. This was as far as the stipulation went. The government did not stipulate as to the reason for the denial. But the appellee says in its brief (p. 6) "At Wilsonia, the sale of liquor, without regulation based on the best interests of the public in enjoying national parks, tends to nullify the purposes of the creation of a national park." This high-sounding phrase when taken with the statement of fact that a permit was denied tends to give an impression directly contrary to the fact. Furthermore, one of the basic fallacies of the appellee's position on this and other fundamental matters throughout the whole brief is that unless the regulation is by the National Park Service, it is inadequate. There is no basis for a contention that a regulation of the sale of liquor would be any better or worse when regulated by the National Park Service than by the State Board of Equalization.

The appellee states (p. 6) that as a practical matter the great majority of property owners at Wilsonia have assumed that the United States has always had jurisdiction. This statement finds no support whatever in the record. Furthermore, the appellants insist and firmly believe that this statement is entirely contrary to the facts.

The appellee states (p. 32) that permits for the sale of liquor are granted on private lands at certain locations in Yosemite. This statement is not supported in any way whatsoever by the record. We do not concede that this statement is accurate. Certainly, the statement is immaterial.

III.

The Appellee Is Asking the Court to Re-write the Statutes and Contracts of Cession.

In the conclusion of appellee's brief it states:

> "While we believe that a holding of jurisdiction in the United States is *justified* under the law as cited, *it admittedly calls for courageous pioneering with new law extending the previously existing precedents.* The court below, once convinced of the merit of the government's position, did not hesitate to take that step." (Emphasis added.)

This statement is, we believe, a frank but genteel statement requesting the court to write judicial legislation. It has been pointed out repeatedly by the appellee, particularly from the language in *Collins v. Yosemite Park Company,* 304 U. S. 518, that the offer to cede jurisdiction by the State of California and the acceptance of such cession is a matter of contract between the state and the federal government. The appellee in its brief also states (p. 11):

> "Admittedly, the Appellee United States of America asked the lower Court, and now asks this Honorable Court, to go one step further in the field of cession of jurisdiction than any Court has heretofore been asked to except in" (certain unreported cases).

By these very statements in the brief, the appellee is requesting that this Court go beyond the terms of that contract, and beyond the terms of the statutes enacted by the respective legislative bodies. In other words, the Court is being asked frankly to re-write the contractual arrangements.

The appellee states that (p. 2) the State of California has challenged the decision of the District Court and has "set forth certain arguments purporting to prove that there are certain unwritten limitations upon the power of the state to cede, and the federal government to accept, jurisdiction. The effect of these contentions is to read into the plain language of the statutes certain limitations and reservations." The appellants disagree. The fact is that the appellants are asking the Court to interpret the statutes exactly as they are written. The appellants have pointed out at great length and wish to reemphasize that the only land included within the national park was land "dedicated and set apart" for park purposes. Furthermore, there was never any dedication nor setting apart of Wilsonia Village for park purposes. Indeed, the only ones who had authority to dedicate and set aside such property for park purposes were the owners thereof. This indeed has never been done. Since when under our system of jurisprudence can a sovereign dedicate and set apart land for any purpose if it does not own or have an interest in the land?

The appellee attempts to avoid meeting this issue squarely, first by claiming that after all it is a side issue, and is "purely a technicality involving an immaterial and collateral point" (p. 32). However, the words "dedicated and set apart" are repeated throughout the statutes and form the very basis upon which the cession was granted and accepted. The cession within a certain boundary related only to property which was "dedicated and set apart for park purposes." The property in Wilsonia after all never was dedicated and set apart for park purposes and therefore it is obvious from the plain reading of the statutes that this property, although entirely surrounded

by property that was dedicated and set apart for park purposes was not affected by the acts of cession.

It is interesting to note that the appellee claims that the words "dedicated and set apart for park purposes" in the acts of cession are technicalities involving an immaterial and collateral point (p. 32); but at the same time, asserts that all of the cases cited by the appellants are "those in which there were conditions to the cession and those conditions were not met and therefore jurisdiction was not ceded" . . . (p. 15). It is obvious from the plain language of the acts of cession that as to Wilsonia Village the "conditions were not met and therefore jurisdiction was not ceded."

IV.

The United States Courts Do Not Have Jurisdiction of Offenses Unless Committed Within or on "Lands Reserved or Acquired for the Use of the United States."

The appellants believe they have set forth explicitly and forcefully in their opening brief that under the fundamental federal law the United States Courts do not have jurisdiction of offenses unless such offenses are committed upon "lands reserved or acquired for the use of the United States." This is, of course, the fundamental jurisdictional statute. The appellee seeks to escape the effect of this fundamental jurisdictional statute, first by contending that the lands in Wilsonia Village are reserved lands. The fallacy of this is immediately obvious. The jurisdictional

statute reads "any lands reserved or acquired *for the use of the United States* . . ." (Emphasis added.) Under no stretch of the imagination could it be said that this land was reserved "for the use of the United States."

The appellee also claims this property was *reserved*. The statute provides otherwise. It is true that in 1890 Section 5, Township 14 was *reserved* and withdrawn from settlement; but the particular statute expressly provided that this act did not relate to bona fide entries previously made. There had been a bona fide entry on the land in question long before the act of Congress, and the patent itself was issued shortly thereafter. In other words, by the very terms of the statute this land was exempt from the provisions of such act.

The appellee likewise seeks to avoid the effect of the fundamental jurisdictional statute by referring to section 3 of 41 Stats. 731, Chap. 218, providing that Sequoia National Park and General Grant National Park shall constitute part of the United States judicial district for the southern district of California and that such courts shall have jurisdiction of "all offenses committed within the boundaries" of said parks. It is quite obvious that the District Court does not have jurisdiction of offenses unless both of two conditions are met. First, it must be within the boundaries of the park and the conditions of subdivision 3 of section 7 of Title 18 of the United States Code must be met. That is to say that the offense must have been committed upon lands reserved or acquired for the use of the United States. Unless this latter condition is met, the Court does not have jurisdiction.

Appellee seeks further to avoid this fundamental principle by stating: "This objection is irrelevant on its face as the instant proceedings is a civil, and not a criminal, action, and whether a state has yielded jurisdiction to the United States is necessarily a federal question" (p. 33). Concededly, this case is not a criminal case. However, in making a determination of the case, the Court must determine the extent of jurisdiction of the District Courts. The determination must not be an academic or theoretical determination. The time may come when an arrest may be made or attempted for an alleged offense in the particular area and then the District Court will be face to face with the real test of jurisdiction. This particular case has been converted from an action for an injunction to one for declaratory relief. The appellants are not objecting to this turn of events. But the appellants insist that in the final analysis a judgment is not of any force and effect unless it can by some legal process be enforced. Therefore, if an individual in Wilsonia Village allegedly commits an offense, such as the sale of liquor, the District Court of the United States has jurisdiction only if the offense was committed upon lands reserved or acquired for the use of the United States. This fundamental premise raised by the appellants cannot be brushed aside on the basis that this proceeding is an equitable proceeding rather than a criminal proceeding.

V.

The State of California Is Concerned With Adequate and Uniform Law Enforcement.

The appellee states that in the acts of cession the state reserved certain powers and rights such as taxation and suffrage, and then claims:

> "Furthermore, even had an express reservation of jurisdiction been made, the state could only reserve such jurisdiction as would not interfere with the uses to be put to the ceded area by the federal government."

The appellee goes on to state that it would seem that the state could not expressly or impliedly reserve powers to itself which would conflict with the proper administration of the national parks (pp. 22-23). The appellee states that the National Park Service would be deprived of the right to maintain law and order and regulate sanitation, pollution of park waters, contamination of watersheds, the kindling of fires near roots of trees and any other problems. It is strange that such a problem is presented for the first time after some of the parks in California have been established for sixty years. There are state laws governing these problems and if the occasion arises the government and its properties can be adequately protected by resort to local law. Indeed, Congress has provided in most instances that the local law in effect at the time of the creation of the parks shall continue in force in such areas. In many instances there are no federal laws or regulations

of any kind concerning certain activities in national parks. Furthermore, the acts of Congress provide that if an offense is committed in a national park and there is no federal law or regulation relating to that offense, that the local law shall apply and the federal court shall enforce the provisions of the local law. We believe that the alleged fears of the government are entirely unfounded. In fact, we believe that there is no fundamental conflict between the federal government and the state government—on the contrary the appellants firmly believe that any alleged disagreement or conflict or fear or whatever else it might be called, is a theoretical fear in the minds of a few and has no relation to the true situation.

The State of California is as much concerned with the uniform and adequate enforcement of the laws as the National Park Service. This action does not, incidentally, involve the enforcement of the laws. It involves the question of whether a liquor license should be issued by the State Board of Equalization or the National Park Service. The National Park Service objected to the issuance of the liquor license by the Board of Equalization, but this objection was not on the grounds that a liquor license should not be issued either to the premises or to the individuals in question, but was purely on a question of jurisdiction. Furthermore, there is no contention that the requirements of the state law relating to the sale and dispensing of liquor are more or less than favorable from the standpoint of the National Park Service than the regulations, if any, of the Secretary of Interior.

It is peculiar that the appellee is fearful concerning enforcement of laws particularly in this case. The transcript shows that the alcoholic beverage license was issued by the State Board of Equalization on July 22, 1948, and that five days later the Regional Director of the National Park Service by letter informed the appellant Petersen that it did not recognize the jurisdiction of the State Board of Equalization, and that if he sold liquor without a permit issued by the National Park Service he would be subject to prosecution. [Tr. pp. 36, 37.] This was July 27, 1948. There is no showing whatever that any criminal prosecution was ever initiated. However, over one year later, that is on August 5, 1949, this action for an injunction was filed. [Tr. p. 10.]

Conclusion.

It has been conclusively shown that the land in question comprising Wilsonia Village, was not "reserved or acquired for the use of the United States" and therefore the District Court does not have jurisdiction of any alleged offenses committed thereon.

It is clear that the land in question has not been "dedicated and set aside for park purposes" and therefore under the terms of the ceding acts that jurisdiction was never ceded nor accepted to the lands in question. Under the American constitutional system as it has prevailed to date, the question of "necessity" of the federal government exercising jurisdiction and ousting the state of jurisdiction is not only unthinkable but also is contrary to

all of our concepts of constitutional government. This case does not call "for courageous pioneering with new law extending the previously existing precedents." On the contrary, the Court is required to look to the ceding acts and interpret those acts the same as it would interpret any covenant or other instrument of like formality. This is not a case that by courageous pioneering a court is warranted in rewriting the ceding acts or of disregarding the specific terms thereof. The appellants respectfully request that the judgment appealed from be reversed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
BAYARD RHONE,
Deputy Attorney General,
Attorneys for the Appellant State of California,

GEORGE, WINKLER & GIBBS,
Attorneys for Appellants Petersen, et al.